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## The Legislature, The Executive and The Courts: The Delicate Balance of Power or Who is Running This Country Anyway?

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*The expanding role of Canadian courts since the introduction of the Charter has prompted critics to decry what they see as excessive and "anti-democratic" judicial activism. The author addresses such criticisms, responding, in particular, to the arguments of Ted Morton and Rainer Knopff. The article critiques the basic elements of Morton/Knopff's thesis: that activist courts are anti-democratic, excessively political, and engaging in illegitimate law-making. Rejecting the claim that Canada's judiciary is a less democratic state institution, the author notes the powerful law and policy-making role performed by the federal cabinet—for practical purposes, an unelected body. The author endorses the dialogue in which courts and legislators have engaged since 1982. This dialogue, he argues, is not only democratic, but also ensures accountability for the judiciary, the legislature, and the executive. Referring to recent Supreme Court of Canada decisions, the author suggests that critics of "interventionist" courts harbor a narrow and simplistic "majoritarian" view of democracy, rather than a more nuanced and rights-sensitive concept of enhanced democracy. Such critics also seem more displeased with the substance of "activist" decisions than with the legitimacy of the courts in rendering them. The author concludes that Canadian courts are performing their appropriate constitutional role, and are generally doing so effectively.*

*L'intervention accrue des tribunaux canadiens depuis la promulgation de la Charte a poussé certaines critiques à dénoncer le recours abusif aux tribunaux pour des velléités qu'ils qualifient volontiers «d'antidémocratiques». L'auteur tente de réfuter ces arguments et en particulier ceux de Ted Morton et de Rainer Knopff. Il s'attaque aux prémisses de base de la thèse soutenue par Morton et Knopff selon laquelle les tribunaux militants font entorse au processus démocratique, sont influencés par des considérations politiques et se livrent à une réforme du droit outrepassant leur compétence. L'auteur rejette d'emblée la notion que le tribunal est une institution moins démocratique que les autres. Personne ne conteste la compétence du cabinet fédéral en matière de droit et de promulgation de politiques. Il s'agit pourtant d'un organisme non élu. L'auteur voit d'un bon oeil le dialogue auquel se livrent les législateurs et les tribunaux depuis 1982. Ce dialogue est non seulement démocratique mais il assure une plus grande transparence de la magistrature, de l'assemblée législative et de l'exécutif. Citant à l'appui, les décisions récentes de la Cour suprême du Canada, l'auteur*

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*accuse les détracteurs des tribunaux «interventionnistes» de préconiser une vision étriquée la démocratie selon laquelle celle-ci doit refléter uniquement la volonté de la majorité. Or, la véritable démocratie doit s'exercer de façon plus nuancée et demeurer sensible aux droits des minorités. En définitive, les détracteurs semblent davantage contester le contenu des décisions soit-disant militantes que la légitimité des tribunaux qui les rendent. Les tribunaux canadiens remplissent les fonctions constitutionnelles qui leur ont été confiées et s'en acquittent très bien de conclure l'auteur.*

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*I. Criticizing the Role of the Courts in Democracy:  
The Ted Morton and Rainer Knopff Critique*

It is easy to sympathize with the courts which seem to be subjected to criticism regardless of what they do. In the pre-*Charter* days, the courts were often criticized for being too restrained and conservative in their approach to the judicial role, following in the tradition of the British courts rather than that of their more activist cousins to the south. These

objections generally came from people on the left of the political spectrum, who were looking for a change to the status quo. Since the arrival of the *Charter*<sup>1</sup> in 1982, the courts are still subject to some criticism from the left for judicializing politics and setting back gains made in the legislative arena.<sup>2</sup> However, more recently, they have been exposed to a critique from the right side of the political spectrum as well. Part of this critique from the right is that the courts have become too activist in their role and have blurred the lines between judging and politics. Both the critics from the left and the right decry the appointed, and therefore allegedly anti-democratic, nature of the courts.

The most sustained and detailed of these recent critiques from the right is that of Professors Ted Morton and Rainer Knopff in their much publicized book, *The Charter Revolution and the Court Party*.<sup>3</sup> I shall reserve my detailed presentation of their views for the next part of this article, where I will attempt to refute most of their allegations against the courts. The essential elements of their critique are three:

1. The Courts are Anti-Democratic;
2. The Courts are Too Activist and Political;
3. The Expansion of the Judicial Role is Illegitimate.

Morton and Knopff define democracy in majoritarian terms and see the expanded policy-making role of the courts as largely advancing minority interests. These interests have either failed to win approval in the political process or not attempted to navigate the political waters at all. Therefore, they do not represent the majority of society and have not followed the normal political route for achieving consensus. Morton and Knopff also point to the appointed nature of the judges and argue that they are ill equipped for a political role of the kind pursued since the arrival of the *Charter*. The authors use the fact that judges are appointed to underscore the undemocratic nature of judicial policy-making; yet they fail to assess how democratic the elected branch of government is—in particular, the Executive. Their wariness of an appointed judiciary blends into the second aspect of their complaint against the expanded judicial role, namely that judges have become too political and are reversing decisions made by the elected branch of government. Morton and Knopff

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1. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [hereinafter *Charter*].

2. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall and Thompson, 1989).

3. F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont.: Broadview Press, 2000) Professors Morton and Knopff are both political scientists at the University of Calgary.

object to both the results and the process by which these results are achieved. In their view both are anti-democratic and inappropriate for the judicial role in Canadian society.

Finally, the authors question the legitimacy of this new ascendancy of the courts as a major policy maker in Canada. Their attack is not so much on the *Charter* itself as on the judges' broad interpretation of it, and of related constitutional documents. Morton and Knopff also see a more sinister aspect to the situation with the emergence of the Court Party, a term they use to describe a collection of various interest groups including equality seekers, civil libertarians, intelligentsia and other interests. It is feared that the courts have become captive to these various interest groups, who, by intervening in important cases, have been able to avoid the normal political process and set the agenda for the courts. Morton and Knopff are particularly concerned about the role of law clerks and law professors in providing a channel for the special interest groups to influence judicial decision-making.

Underlying their objections to the process of judicial decision-making is a strong dissatisfaction with the shift in values being ushered in by the courts. In this regard they express particular concern about the broad definition of equality being promoted by courts and human rights tribunals under both the *Charter* and human rights legislation. The authors see these changes not as the logical result of the texts of the *Charter* and the human rights codes, but rather as the product of activist judicial interpretation that is aided and abetted by the lobbying of special interest groups.

Throughout their book Morton and Knopff refer to "special interest" groups without making any distinction between interests and rights. In keeping with this terminology, there is a clear tone in the book that these "special interest" groups are in some sense illegitimate, or at least that they are attempting to achieve their purposes by questionable means. Many of those so called interest groups, such as the equality seekers, could more accurately be referred to as rights seeking groups—a terminology which would accord them a higher and more legitimate status. This debate about the proper terminology is reflective of a more substantive disagreement between myself and Morton and Knopff as to the proper role of courts in Canada and the legitimacy of vindicating rights in courts, without succumbing to a purely political choice between conflicting "interest groups".

I will argue that the role of the courts is in balance with the legislative role. The dialogue between the two bodies is democratic and provides a method of accountability for both branches of the state. The judges preserve the values enshrined by the *Charter*, while the legislators

continue to represent Canadian society. Without an independent court system, governments could go unchallenged, especially where there is little real opposition in a government-dominated legislative chamber. However, without the power to implement and change legislation to reflect a changing / evolving society, the country would be run by an appointed few. That appointed few would not be the judges about whom Morton and Knopff complain, but rather the Prime Minister and the members of Cabinet.

For even though Canada's executive branch must be selected from the elected branch of government (unlike the separation of powers in the United States), the party system provides little real accountability to the elected branch for Cabinet, which is the real heart of power. Together, courts and legislatures can achieve a balance that upholds democracy and protects both majority and minority rights. This combination achieves a democracy in its more sophisticated and nuanced form as I shall explore further in the next section of this article.

## *II. In Defence of the Courts: the Proper Judicial Role in a Constitutional Democracy*

### *1. The Definition of Democracy in Canada*

One of the most fundamental critiques that Professors Morton and Knopff make is that the expansion of the role of the courts in Canada since 1982 is anti-democratic and significantly shifts policy making away from the elected representatives of the people. The authors set out their somewhat idealized definition of democracy in the following terms:

Our primary objection to the Charter Revolution is that it is deeply and fundamentally undemocratic, not just in the simple and obvious sense of being anti-majoritarian, but also in the more serious sense of eroding the habits and temperament of representative democracy.

...

The growth of courtroom rights talk undermines perhaps the fundamental prerequisite of decent liberal democratic politics: the willingness to engage with whom one disagrees in the ongoing attempt to combine diverse interests into temporarily viable governing majorities.<sup>4</sup>

Although this articulation could support a protection of minority as well as majority views, this idealized concept, as developed in their book, in practical terms gives the majority view clear preference. Indeed, such majoritarian privilege is inherent in Canada's current political structure, as in that of most western democracies.

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4. *Ibid.* at 149.

This "majoritarian" definition of democracy is not in accordance with the more nuanced modern versions of democracy in which respect for minority interests, as well as attention to majority will, is vital. Another group of political science professors in *Final Appeal: Decision-Making in Canadian Courts of Appeal*,<sup>5</sup> define democracy in much broader terms:

[W]e argue that the debate about whether judicial lawmaking undermines democracy becomes far less important when democracy is considered not merely as lawmaking through elected legislatures, but more basically as government operating on the principle of mutual respect. A more important question for debate is whether judges tend to pursue decision-making strategies designed to give effect to democratic principles.<sup>6</sup>

Later in referring to the *Reference Re Secession of Quebec*<sup>7</sup> the authors of *Final Appeal* link their definition to that of the Supreme Court of Canada:

The court listed a number of the important ingredients for democracy. But, we argue, behind all these the basic principle from which the notion of democratic government arises is the principle of mutual respect. Indeed, democracy can be thought of as government based on the principle of mutual respect.<sup>8</sup>

In *Reference Re Secession of Quebec*<sup>9</sup> the Supreme Court of Canada articulated the underlying principles of the Canadian Constitution including: federalism, democracy, the rule of law, and the protection of minorities. The Court saw these principles as interconnected, and thus democracy must take account of the rule of law and vice versa. The Court defines democracy as follows:

Finally we highlight that a functioning democracy requires a continuous process of discussion. The Constitution mandates government by democratic legislatures, and an executive accountable to them, 'resting ultimately on public opinion reached by discussion and the interplay of ideas' (*Saumur v. City of Quebec*, *supra*, at p. 330). At both the federal and provincial level, by its very nature, the need to build majorities necessitates compromise, negotiation, and deliberation. No one has a monopoly on truth, and our system is predicated on the faith that in the marketplace of ideas, the best solutions to public problems will rise to the top. Inevitably, there will be dissenting voices. A democratic system of government is committed to considering those dissenting voices, and seeking to ac-

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5. I. Greene et al., *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: Lormier & Co. Ltd., 1998) [hereinafter *Final Appeal*].

6. *Ibid.* at 2.

7. [1998] 2 S.C.R. 217 [hereinafter *Reference Re Secession of Quebec*].

8. I. Greene et al., *supra* note 5 at 11.

9. *Supra* note 7.

knowledge and address those voices in the law by which all in the community must live.<sup>10</sup>

Further, in this decision the Court refers to the requirement of an “enhanced majority” as a way of protecting minority interests in the process of constitutional change.<sup>11</sup> Democracy is more than the mere expression of simple majority will.

A good illustration of the different outcomes that can be achieved by using different conceptions of democracy is provided by the Supreme Court of Canada decision of *R. v. Latimer*.<sup>12</sup> This high profile and controversial case involving the Saskatchewan farmer who killed his daughter, who was seriously disabled, in what is generally referred to as “mercy killing,” sparked national debate. While some polls suggest that as many as 75% of Canadians support mercy killing and think that Mr. Latimer should not be severely punished, there are strongly held views that to give any special clemency to Mr. Latimer would devalue the lives of the disabled. The disabled and their supporters who hold this latter view would be an example of the minority interest group, who Morton and Knopff think have too much influence on the courts. The Supreme Court of Canada upheld the mandatory ten year minimum statutory jail time for Mr. Latimer and would likely be seen by Morton and Knopff as thereby vindicating the interests of the disabled lobby, even in the face of a strong majority sentiment to be more lenient with Mr. Latimer. The justices of the Supreme Court of Canada might well answer that they were merely upholding the sanctity of human life by applying the legislatively dictated minimum ten year sentence.

Thus, while the majority of Canadians (according to polls reported in the newspapers), were apparently more concerned about compassion for the well intentioned father who took his daughter’s life than for the life of the disabled child and its sanctity, the justices of the Supreme Court of Canada had a different view. A majoritarian view of democracy in its literal sense would not have protected the rights of the disabled in this case. The Supreme Court of Canada, applying a view of “enhanced democracy” that balances the competing rights in society, upheld the right to life in Canadian society for all its members, including the disabled. The position of the Supreme Court of Canada respects the foundational value of the sanctity of human life, as reflected in the *Charter of Rights* but also as widely accepted by a majority of Canadians. The *Latimer* case provides a good illustration of the vital contribution of

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10. *Ibid.* at para. 68.

11. *Ibid.* at para. 77.

12. [2001] 1 S.C.R. 3 [hereinafter *Latimer*].



the courts to the protection of minority rights and the rule of law as a vital component of a true democracy.<sup>13</sup>

The complex nature of value disputes that must be resolved in modern democracies such as Canada can rarely be neatly divided into majority against minority. In *Trinity Western University v. B.C. College of Teachers*<sup>14</sup> the Supreme Court of Canada had to balance minority religious views opposed to homosexuality and the equality rights of gays and lesbians. In essence, the Supreme Court of Canada considered whether British Columbia College of Teachers (BCCT) had jurisdiction to consider whether Trinity Western University's program was discriminatory as well as the appropriate standard of judicial review. However, the Court also addressed how to reconcile the religious freedoms of individuals wishing to attend Trinity Western University with the equality concerns of students in the British Columbia school system.

The Majority (Iacobucci and Bastarache JJ. for McLachlin C.J., Gonthier, Major, Binnie, Arbour and LeBel JJ.) felt that the appropriate standard of review was correctness (based on absence of a privative clause, the expertise of the BCCT, the nature of the decision, and the statutory context). With respect to the balancing of freedom of religion and equality rights, the court states that freedoms are not absolute.<sup>15</sup> Rather, they feel that the key "to drawing the line" is distinguishing between holding discriminatory views and acting on them and conclude, "[t]he freedom to hold beliefs is broader than the freedom to act on them."<sup>16</sup> The court goes on to say that acting on discriminatory beliefs would result in discipline being instituted against the actor. However, if a court were to limit the freedom of religion, it could only do so if evidence were adduced to show discriminatory conduct; there was no such evidence in this case. The Supreme Court of Canada seems, then, to focus on the rights of the teachers and institutions as opposed to the rights of the students. The Court was satisfied that, because there was no evidence of discrimination, they should not restrict the freedom of religion.

L'Heureux-Dubé was the sole dissenter in this case. She felt that the appropriate standard of review was patent unreasonableness since BCCT, as the expert teacher certification body, was supposed to review teaching programs and develop policy. The decision of the BCCT was not patently

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13. This is not to suggest that courts in Canada have always been the champions of minority rights, and our record in this regard is not as impressive as the selective historical account in *Reference Re Secession of Quebec*, *supra* note 7, would suggest. However, the courts have played an increasingly important role in counter balancing the majoritarian tendencies of the legislative branch of the state.

14. [2001] 1 S.C.R. 772 [hereinafter *Trinity*].

15. *Ibid.* at paras. 29-32 ff.

16. *Ibid.* at para. 36.

unreasonable as “signing the contract makes the student or employee complicit in an overt, but not illegal, act of discrimination against homosexuals and bisexuals”.<sup>17</sup> Justice L’Heureux-Dubé further states,

With respect, I do not see why my colleagues classify this signature as part of the freedom of belief as opposed to the narrower freedom to act on those beliefs . . .<sup>18</sup> In *Ross*,<sup>19</sup> . . . the Board of Inquiry noted that human rights legislation ‘does not prohibit a person from thinking or holding prejudicial views. The Act, however, may affect the right of that person to be a teacher *when those views are publicly expressed in a manner that impacts on the school community* or if those views influence the treatment of students in the classroom by the teacher. . .’<sup>20</sup>

It would be difficult to ascertain the majority sentiment of Canadians in this case, and it is not the role of the Court to do so. Instead, the Court turned to the guarantees of freedom of religion and equality in the *Charter of Rights* and gave preference to freedom of religion and thought, at least to the point where acting on one’s beliefs would violate the equality rights of gays and lesbians. Justice L’Heureux-Dubé, in dissent, would have come down on the side of the equality rights of gays and lesbians and argued that the majority position devalued their rights to dignity and respect. To resolve disputes in majoritarian terms does not do justice to the complexity of the value disputes that confront all branches of the modern democratic state. The enhanced view of democracy which encompasses the protection of both majority and minority interests offers greater promise for a fair and responsive state that respects the rights of all its citizens.

In this broader view, there is an important and legitimate role for the courts as protectors of minority interests in a constitutional democracy. The authors of *Final Appeal* refer to the work of Professor David Beattie as one writer who embraces the courts as promoters of democracy:

David Beattie stepped into the democracy versus the courts debate with his book *Constitutional Law in Theory and Practice*. Beattie argued that in the current complex political environment, issues of individual fairness are liable not to get the attention they deserve from elected politicians. Therefore, a transfer of some decision-making power to the courts is not a bad thing in order to prevent the legitimate rights claims of individuals—claims legitimized by laws enacted by democratically elected legislatures—from falling into the cracks. Judicial participation in policy-making is therefore essential to preserve fundamental democratic norms.<sup>21</sup>

17. *Ibid.* at para. 72.

18. *Ibid.* at para. 72.

19. This reference is to *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [hereinafter *Ross*].

20. From para. 39 of *Ross*, *ibid* [emphasis added by L’Heureux-Dubé J., *Trinity*, *supra* note 14 at para. 72].

21. *Supra* note 5 at 9.

The role of the courts is even more emphatically asserted by Professor Martha Jackman in the following passage:

From the foregoing discussion I hope that it has become clear that judicial review of executive and legislative action on *Charter* grounds has the potential to enhance rather than, necessarily, to detract from the quality of democratic decision-making at all levels of government. By interpreting section 7 principles of fundamental justice to require meaningful participation by those whose interests are affected in individualized decision-making, in broader policy making within the executive branch, and in the legislative process itself, the courts can provide an important avenue for challenges to antidemocratic tendencies in our current parliamentary system.<sup>22</sup>

In her reference to the “anti-democratic tendencies in our current parliamentary system”, Professor Jackman also highlights another weakness in the Morton and Knopff critique of the role of the courts in Canadian society. Professor Jackman argues that merely because the legislators are elected does not ensure that they are accountable or fully represent the people in the practical sense. It is easy to overstate the accessibility of the legislative structure, when so much power is concentrated in the Cabinet—as the pinnacle of the executive structure. This concentration of power, which is reinforced by strict party discipline, means that policy-making in Canada is largely removed from our elected representatives and placed in the hands of the executive. In comparison with the power of the executive, the power of the courts is extremely limited. This is a point recognized by other writers as well:

When, in the course of judicial review, the courts are compelled to examine policy questions, the narrow and issue-specific scope of inquiry cannot be compared to the broad mandate that governments have to make comprehensive policies within their constitutionally defined jurisdictions. Senior government bureaucrats, who exercise overall much greater impact on policy and its implementation, are as unelected, unrepresentative, and socially privileged as judges, and their accountability to the public leaves a great deal to be desired.<sup>23</sup>

Since Morton and Knopff are concerned with the exercise of power by unelected people, I suggest that their main concern should be the potential abuse of power by unelected bureaucrats.

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22. M. Jackman, “Separate but not Apart: The Role of the Courts in Canada’s Post Charter Democracy” in D. Magnusson, D.A. Soberman & W.R. Lederman, *Canadian Constitutional Dilemmas Revisited* (Kingston, Ont.: Institute of Intergovernmental Relations, Queens University, 1997) at 40.

23. I. Greene et al., *supra* note 5 at 5.

There is an important role for the courts in making the executive branch of government more accountable.<sup>24</sup> This is a traditional role performed by courts under the common law principles of administrative law and the interpretation and application of statutes designed to ensure that administrators operate within proper bounds in both procedural and substantive terms. This judicial role has been enhanced since 1982 by extending the role of the courts in constitutional review to violations of *Charter* rights and Aboriginal rights as well as the traditional division of powers analysis. Thus, the courts and judicial review are an integral part of our democratic structure and not antithetical to it as Professors Morton and Knopff suggest.

## 2. Activism and Restraint: *The Thin Line Between Adjudication and Politics*

Striking the proper balance between restraint and activism in adjudicating disputes has always been a difficult task and one that sparks criticism of the courts. In the past the courts have been criticized as being too conservative and restrained in their approach to judicial decision-making. Typical of this kind of complaint was the controversial book by Professor Paul Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada*.<sup>25</sup> As previously mentioned, the criticisms of the courts have changed since the arrival of the *Charter* in 1982. Earlier criticism that stemmed from the left, has now been replaced by criticisms from the right. It is now argued that the courts are too activist and are usurping the policy-making role of the elected branch of government. This new criticism is pointedly made by Morton and Knopff in the following passage:

It is extensive recourse to the courtroom as a policymaking arena, not necessarily the particular outcomes of litigation, that constitutes the heart of the *Charter* revolution. ...

In a dazzling exercise of self-empowerment, the Supreme Court has transformed itself from an adjudicator of disputes to a constitutional oracle that is able and willing to pronounce on the validity of a broad range of public policies.<sup>26</sup>

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24. Professor Morton, himself, in an earlier article acknowledges that the use of judicial review against the executive is often to enforce, not frustrate, legislative policy. F.L. Morton, "The Political Impact of the Canadian Charter of Rights and Freedoms" (1987) 20 Can. J. of Pol. Sci. 31. I am not suggesting that the bureaucrats are not guided by the law, for most are. My argument is that judges by training and background are well suited to ensure that the rule of law not be eclipsed by the everyday pressures of politics. The courts can make the Executive accountable in ways that the legislative branch cannot.

25. This book was particularly controversial because of its blunt criticisms of the Supreme Court. Such criticisms were not common at that time. P. Weiler, *In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell, 1974).

26. *Supra* note 3 at 21, 34.

### a. *Defining Judicial Activism*

One of the central problems in the activism and restraint debate is defining what is meant by judicial activism. It is interesting to note that Professor Morton expressed a more positive view of judicial review under the *Charter* in an earlier article. He states:

With respect to other Charter rights such as the ... Equality Rights provisions, judicial review may assist in weeding out archaic and poorly drafted statutes and forcing responsible legislatures to rewrite their statutes in a manner that provides greater protection for the important political values embodied in the Charter.<sup>27</sup>

In this same article, Professor Morton described the effect of the *Charter* as producing constitutional supremacy not judicial supremacy. However, in their book, Morton and Knopff express a quite different opinion.

In refuting an earlier assertion by Professor Patrick Monahan<sup>28</sup>, Professors Morton and Knopff make the following analysis of the activism of the Supreme Court since the arrival of the *Charter*:

Although this jurisprudence is clearly activist, many of the relevant cases overrule police practices rather than laws, and are thus not counted in Monahan's activism statistics. Had Monahan counted them, his activism figures would have been higher. Similarly, granting Monahan's definition of activism, the rate at which statutes are nullified should be based not on all Charter challenges but only on those actually involving challenges to legislation. Counting just Charter challenges to statutes over 16 years the nullification rate is 32 per cent (58/183), not 16 per cent (58/373). In addition, Monahan's concentration on the nullification of statutes fails to account for cases like *Butler* and *Egan*, which, as we have seen, involve considerable policy innovation in the very course of upholding a statute. Finally, global assessments of activism and innovation mask concentrations of judicial policy-making in certain areas. For example, a study of 47 cases involving feminist issues found a success rate of 70 per cent. Similarly, pockets of activism and innovation exist in litigation involving aboriginal rights, language rights, and gay rights. Indeed, as we noted above the Court's gay-rights ruling in *M. v. H.*, a same-sex-spouse decision, lays the groundwork for invalidating hundreds of federal and provincial laws. A single blockbuster case like this renders denials of judicial activism problematic.<sup>29</sup>

While striking down legislation can have large implications, upholding legislation can be just as important. Professor Kent Roach supports the view that judicial activism can be expressed just as much in the

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27. *Supra* note 24 at 53.

28. J. Tibbets, "Top Court Judges Shy Away From Rewriting Laws: Study" *National Post* (9 April 1999).

29. *Supra* note 3 at 20.

upholding of a statute or government policy, as in striking it down.<sup>30</sup> In fact he suggests that when a court renders a statute *Charter* proof, that is in some ways more activist than striking the statute down, as such a decision to uphold effectively ends the dialogue between the courts and the legislatures. This is particularly true when the decision is made by the Supreme Court of Canada. Professor Roach also argues in his article that judicial activism is a healthy thing which has been practiced in both common law cases and constitutional law cases, long before the *Charter*. Roach is a strong supporter of the judicial / legislative dialogue, which, he argues, produces better laws at the end of the day.

Professors Morton and Knopff assume that judicial activism is normally used to attack the legislative status quo and thus pits the courts against the policies of the other branches of government. This is not always the case, as evidenced by a recent decision in which the statutory waiver of a requirement for warrants in the non-emergency apprehension of children was upheld by a majority of the Supreme Court of Canada.<sup>31</sup> The majority decision of Justice L'Heureux-Dubé was criticized in the dissenting opinion of Justice Arbour as straying too far into the field of social policy, and in that sense being activist. This is an example of activism in support of a legislative policy aimed at protecting children.

To further complicate matters, the courts can strike down legislation without engaging in judicial activism. A good example of this is the decision from the Alberta courts striking down the spending limits imposed by the federal *Elections Act*.<sup>32</sup> In the name of freedom of expression, the Alberta courts issued a temporary injunction nullifying the spending limits imposed by statute. In so doing they opposed legislative policy, but also promoted the traditional status quo, whereby limits were not placed upon groups wanting to spend money on elections—such as the National Citizens Coalition.

Because the Supreme Court of Canada has been seen as more activist since the *Charter*, there have been calls to restrain the power of the judiciary.<sup>33</sup> This movement has been especially strong within the Reform Party (now the Canadian Alliance), which would like to see the establishment of a committee to review decisions of the Supreme Court. This committee would advise Parliament as to whether any legislative action

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30. K. Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures" (2001) 80:1&2 Can. Bar Rev. 481 at 485.

31. *Winnipeg Child and Family Services v. K.L.W.*, [2000] 2 S.C.R. 519 [hereinafter *K.L.W.*].

32. J. Gatehouse, "Campaign Gag Law Sent Into Limbo" *National Post* (24 October 2000). The decisions of the Alberta courts were reversed in the Supreme Court of Canada, which upheld the spending limits in the *Canada Elections Act*, R.S.C. 1985, c. E-2.

33. Morton and Knopff are among the leading critics of the Supreme Court of Canada's activism. See *e.g. supra* note 3.

is necessary, including the use of the notwithstanding clause, to restore the legislation or the application of the *Charter* to its original intent.<sup>34</sup> An example of the discontent was apparent when intergovernmental affairs Minister Norm Sterling wrote to Justice Minister Anne McLellan, "Recently, decisions of the Supreme Court of Canada have increasingly shifted toward determining social and economic policy. Decisions that have such effects are not in accordance with the public's understanding of the respective role of legislators and the judiciary in our parliamentary and legal systems."<sup>35</sup>

Judicial activism has been defined by the late Justice MacGuigan as "an approach that recognizes, accepts and tends to exercise the judicial role as legislator."<sup>36</sup> Morton and Knopff define it as "the disposition [of judges] to interpret rights broadly and enforce them vigorously."<sup>37</sup> Judicial activism is cited as the problem when judges use non-traditional principles to protect the rights of individuals or groups; thus, one's definition of judicial activism is clearly related to one's belief about the proper constitutional role of a judge.<sup>38</sup>

In order to determine whether or not the court has engaged in judicial activism, one must look beyond the form of a decision, to its effects. Striking down legislation does not always amount to activism. Similarly, the court may engage in judicial activism merely by upholding the constitutional validity of legislation. In both cases, the question is the same: is the court's decision primarily legal or primarily political? If it is primarily political, this is an example of judicial activism.

I prefer the definition of activism put forward by the late Justice MacGuigan, which emphasizes the way in which decisions are made rather than the substantive result. This was the nature of the debate between Justice L'Heureux-Dubé and Justice Arbour in the recent case on warrants in child apprehensions. The dissenting justices argued that Justice L'Heureux-Dubé based her decision too much on social policy and the desirability of protecting children.<sup>39</sup> It can be argued that Justice Arbour in dissent (joined by Chief Justice McLachlin) examined the policy issues, but in the context of the competing legal principles, such as parental rights.

34. P. Manning, "Parliament, Not Judges, Must Make the Laws of the Land" *Globe and Mail* (16 June 1998) A23.

35. "Judicial Activism is not a Figment of the Imagination" *Globe and Mail* (1 October 1999) A16.

36. Hon. M. MacGuigan, "Sources of Judicial Decision Making" in S. Martin & K. E. Mahoney, eds., *Equality and Judicial Neutrality* (Calgary: Carswell Legal Publication, 1987) at 30.

37. R. Knopff & F.L. Morton, *Charter Politics* (Scarborough, Ont.: Nelson Canada, 1992) at 19.

38. Hon. B. Dickson, "Madam Justice Wilson, Trailblazer for Justice" (1992) 15 *Dal. L.J.* at 9.

39. *K.L.W.*, *supra* note 31.

Another illustration of this point is the performance of the Supreme Court in cases concerning Aboriginal rights. In leading cases such as *R. v. Van der Peet*<sup>40</sup> and *R. v. Gladstone*<sup>41</sup> the various judges took different approaches to their difficult task of defining Aboriginal rights. In these cases Justice McLachlin (as she then was) criticized the approach taken by then Chief Justice Lamer as based too heavily upon a balancing of the competing interests of the Aboriginal and non Aboriginal segments of society. She was more sceptical than Chief Justice Lamer of the concept of reconciliation, as the foundation of the guarantees in section 35 of the *Constitution Act, 1982*.<sup>42</sup> Justice McLachlin in *Vander Peet* and *Gladstone* preferred to build on the common law in defining the proper scope and meaning of Aboriginal rights. Her preference was to anchor the Court's decisions in law as modified by policy, rather than to base decisions directly on policy and modify the law accordingly. In Justice McLachlin's view, the approach of Chief Justice Lamer in the Aboriginal cases blurs the line between law and politics.

This same kind of debate emerged again in the *R. v. Marshall*<sup>43</sup> cases involving the proper interpretation of fishing rights under a 1760 treaty between the Mi'kmaq and the Crown. Once again Chief Justice McLachlin favoured a more legalistic and narrower interpretation of the Treaty than the majority of the Court, speaking through Justice Binnie. Using evidence extrinsic to the Treaty, Justice Binnie found a meaning for the Treaty which he felt would do justice to the honour of the Crown, even if it seemed to go well beyond the text of the Treaty.

One could certainly sympathize with the Court for feeling unfairly criticized for activism in the Aboriginal rights area, as the other branches of government have failed to define Aboriginal rights at any level. Not only have the various levels of government had little success in making agreements with the Aboriginal peoples of Canada, but also they have failed to define Aboriginal rights in the series of conferences proposed in the *Constitution Act, 1982*. Thus the courts have inherited this difficult task by default. It is also hard to imagine how an issue as contentious as the definition of Aboriginal rights could be resolved without in some way entering the realm of political debate. As I have argued elsewhere, judging is in many ways an inherently political process and this is particularly evident in dealing with constitutional matters, in all their forms.<sup>44</sup>

40. [1996] 2 S.C.R. 507 [hereinafter *Van der Peet*].

41. [1996] 2 S.C.R. 723 [hereinafter *Gladstone*].

42. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

43. *R. v. Marshall*, [1999] 3 S.C.R. 456; *R. v. Marshall*, [1997] 3 S.C.R. 533.

44. W. MacKay, "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" (2001) 80:1 & 2 Can. Bar Rev. 241 at 255.



One of the central complaints of Morton and Knopff is that judges have a blank cheque in making policy under the *Charter*, and that this is not appropriate for an un-elected branch of the state. This idea that judges have unbridled discretion in making their decisions has been challenged by other writers such as the authors of *Final Appeal* who refer to the following restraints on judging:

[First] there are some outcomes that individual decision-makers might personally prefer but that cannot be linked to the kind of 'reasons' that other actors will accept. Second, the giving of reasons exposes a logical trail that invites further examination and subsequent review by a 'higher' court, a review that would be far more difficult if a decision were simply a flat one-line outcome. Third, the giving of reasons constitutes a promise of similar treatment to similar actors in the future, a way in which they can make undesirable outcomes less likely and desirable outcomes more likely simply by shaping their actions so as to conform with the standards that the immediate case declares.<sup>45</sup>

Elsewhere I argue that while judges do have a broad discretion, they are still tethered, even if it is more by a "bungee cord" than a chain.<sup>46</sup> Their branch of politics is different from that of the legislators and administrators. This expanded role for the courts adds fuel to the arguments that we need to rethink our processes for appointing and educating judges and reconsider issues such as representation and diversity on the Bench.<sup>47</sup> This raises the large issue of who will sit as judges and what perspectives they bring to the task of judging. Judges are not supposed to be representative in the sense of speaking on behalf of particular people or groups; indeed, independence from special interests is one of the hallmarks of the judiciary. However, as the task of judging becomes increasingly political in nature, it is important that judges have a range of backgrounds and perspectives that can be brought to the difficult process of deciding between conflicting and complex social claims. Suffice it for present purposes to say, that there is a link between the role of the judge in Canadian society and the qualifications that should be considered in the appointment of judges.

In response to anti-activist critics, supporters of judicial activism say such activism is necessary because it allows the courts to step in and fill gaps in the law where minorities are not protected because of political pressures and where politicians are afraid to legislate.<sup>48</sup> Yet, Frederick

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45. *Supra* note 5 at 130-31.

46. R. Devlin, W. MacKay & N. Kim, "Reducing the Democratic Deficit: Representation, Diversity and the Canadian Judiciary or Towards A 'Triple P' Judiciary" (2000) 38 *Alta. L. Rev.* 734 at 751.

47. *Ibid.* at 788-811.

48. MacGuigan, *supra* note 36 at 31.

Vaughan says, “what has come to be known as ‘judicial activism’ is little more than the sharp edge of judicial review – the act by which judges assess the validity of legislation or government regulations.”<sup>49</sup> Historically, Canadian courts have tended to follow the British tradition of restraint or deference rather than the more activist stance of American judges, but “because of the federal nature of Canada’s constitution, with spheres of legislative jurisdiction divided between the federal and provincial governments, our Courts have always been more directly involved in the politics of the country than British courts.”<sup>50</sup>

Justice Rosalie Abella, of the Ontario Court of Appeal, has commented on the difference between the relationship to the public of judges and legislators. Legislators are elected to implement the public will, yet “the public will is often difficult to ascertain or implement.” The judiciary is accountable “less to the public’s opinions and more to the public interest.”<sup>51</sup> Justice Abella, speaking at Osgoode Hall Law School, further stated: “While legislatures respond of necessity to the urgings of the public, however we define it, judges serve only justice.”<sup>52</sup>

The nature of the institution puts constraints on judges – a fact of life recognized in the writings of the late Chief Justices Laskin and Dickson.<sup>53</sup> It is well recognized that, “credibility and trust are the main sources of judicial power, and judges are concerned that if they step too far beyond traditional judicial bounds their rulings will lose legitimacy.”<sup>54</sup> At the 1998 Canadian Bar Association’s Annual Meeting, Justice Lamer emphasized the importance of support for the Bench in the midst of a media frenzy about judicial activism: “the judges have come to command a certain degree of respect or it’s chaos and the whole system falls apart.”<sup>55</sup> New Brunswick Chief Justice William Hoyt went after the provincial government for not defending judges that are attacked by the media and conservative politicians: “Only rarely, when judges or the courts have been unfairly attacked, have the (New Brunswick Justice) department spoken up.”<sup>56</sup>

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49. F. Vaughan, “Judicial Politics in Canada: Pattern and Trends” (1999) 5:1 Choices 4 at 5.

50. *Ibid.* at 6. See also MacKay, *supra* note 44.

51. P. Crawley, “Judges and the Public Interest” *Globe and Mail* (14 April 2000) A 14.

52. *Ibid.* at A 14.

53. B. Laskin, *The Institutional Character of the Judge* (London: Oxford Press, 1972); B. Dickson, “The Judiciary—Law Interpreters or Law Makers” (1982) 12 Man. L. J. 1.

54. Devlin et al., *supra* note 46 at 744.

55. M. Bourrie & E. Atkins, “Judges Fighting Back” (1999) 25:8 Can. Law. 18(5) at 19.

56. *Ibid.*

In December 1998, the Judicial Council – headed by former Chief Justice Lamer – came out with a list of rules dealing with the scope for judicial pronouncements. The chair of the committee who drafted the rules, Manitoba Chief Justice Richard Scott, said, “There are certain circumstances when a judge can speak out, and that is when the system is under attack.”<sup>57</sup> He said judges should comment publicly when the courts are accused of being soft on crime or when people say that judges are over-stepping their bounds by “interpreting and enforcing the Charter.”<sup>58</sup> However, on social and political issues of the day, he said, “restraint is the watchword.”<sup>59</sup> By nature judges are conservative in their style and careful about what they say. Restraint comes naturally to most, so one could say that “the Bench is an unlikely habitat for revolutionaries.”<sup>60</sup>

*b. Exercising the New Judicial Role: Dialogue Not Dissonance*

The defenders of the new more activist role for the courts on matters of public policy point to the dialogue between the courts and the legislatures that has been sparked by *Charter* review. As Professor Kent Roach argues, neither the judges nor the legislators have the final say under the Canadian Constitution, because of the section 33 opt out clause and the section 1 reasonable limits justification.<sup>61</sup> What is encouraged is an ongoing dialogue between the various branches of government, which should produce laws that better balance the competing interests, thereby better serving the Canadian public. However, not everyone takes this positive view of the *Charter*.

The tension between the role of Parliament and the Judiciary in making and interpreting law is explicit in the context of the debate surrounding the *Charter*. Robert Fulford, in his article, “A Charter of Wrongs,”<sup>62</sup> refers to the United States Constitution, saying that judges, rather than elected officials, dictate every detail of public policy. By allowing this type of subjectivity and flexibility in the interpretation of equality guarantees in the Canadian *Charter*, he asserts that a new class of potential dictators is created.<sup>63</sup> Professor Andrew Petter (formerly a British Columbia Cabinet Minister) also takes issue with the *Charter*,

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57. *Ibid.* at 21

58. *Ibid.*

59. *Ibid.*

60. A.W. MacKay, “Fairness After the *Charter*: A rose by any other name?” (1985) 10 *Queen’s L.J.* 263 at 335, n. 302.

61. *Supra* note 30 at 483.

62. R. Fulford, “Charter of Wrongs” *Saturday Night* (December 1986) 7.

63. *Ibid.*

calling it “a regressive instrument more likely to undermine than to advance the interests of the socially and economically disadvantaged Canadians.”<sup>64</sup>

### *Section 33 and Other Responses*

The Charter’s judicial mandate is formally circumscribed by two legislative “escape hatches.” Section 1 states that “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>65</sup> Section 33 permits Parliament or a legislature to “expressly declare in an Act of Parliament or of the legislature that the Act or provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.”<sup>66</sup>

As Canadian lawyer Edward Greenspan sardonically put it in a speech he gave in Washington D.C. on freedom of expression, section 1 says:

People of Canada! Don’t get overly excited about what you are about to read. We know this is our *Charter of Rights* a pack of rights that include freedom of expression, freedom of press, right to a jury trial, and the right to fundamental justice (we couldn’t even bring ourselves to call it due process). But before you get too excited, we want you to know that all of the so-called guaranteed rights you are about to read are subject to reasonable limits that may be imposed by the government upon you in a free and democratic society.<sup>67</sup>

He comments that unlike the American First Amendment, “[f]ree speech in Canada begins with ‘ifs’, ‘buts’ and ‘whereases.’”<sup>68</sup> The effect is that the government can pass any law as long as it can be justified as reasonable.

While section 1 may appear to provide enough leeway for the government, section 33 acts as a further safeguard for legislatures. With this section, a law can be immunized against all challenges, without any required justification.<sup>69</sup> Former Prime Minister Brian Mulroney made it clear that he believed section 33 was a mistake. In a speech to the House of Commons in 1989 he said that the notwithstanding clause limited

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64. A. Petter, “Immaculate Deception: The Charter’s Hidden Agenda” (1987) 45 *The Advocate* 857 at 857.

65. *Charter*, *supra* note 1.

66. *Ibid.*

67. E. Greenspan, “Freedom of Expression in Canada: Ifs, Buts, & Whereases” (Ambassador’s Lecture Series Presentation, Canadian Embassy, Washington, D.C., 26 September 1995) (1995) 29 *L. Soc. Gaz.* 212 at 215.

68. *Ibid.* at 216.

69. Hon. B. McLachlin, “Charter Myths” (1999) 33 *U.B.C. L. Rev.* 23 at 28.

fundamental freedoms and that “never before [had] the surrender of rights been so total and abject.”<sup>70</sup>

In what has been called “the quintessential Canadian compromise,”<sup>71</sup> section 33 of the Canadian Charter of Rights and Freedoms attempts to balance power between the courts and the legislatures. The clause allows the legislatures and the Parliament of Canada, in certain instances, to override the provisions in the *Charter*. Professor Peter Russell says that the legislative override clause provides a process whereby the justice and wisdom of a judicial decision can be publicly discussed and possibly rejected.<sup>72</sup> Judges are not infallible and are sometimes exposed to “the scantiest submissions on, the relationship of a challenged law to its total social or policy context.”<sup>73</sup> Furthermore, both courts and legislatures are capable of being unreasonable, thus, “[b]y providing a legislative counterweight to judicial power the Canadian *Charter* establishes a prudent system of checks and balances and gives closure to the decisions of neither.”<sup>74</sup>

Section 33 has been used by only two provincial legislatures: Quebec and Saskatchewan. It has been publicly contemplated in Alberta but not used there, and it has never been successfully used in Parliament. Leeson calls the notwithstanding clause a “paper tiger.” Section 33 may be available in theory, but he feels “that the less it is used, the less likely it will be used.”<sup>75</sup> While Alberta Premier Ralph Klein mused about invoking the notwithstanding clause, he withdrew his threat when the public proved to be quite unsupportive: “[t]he negative reaction by the people of Alberta to the use of the notwithstanding clause seems to point to a general reluctance of the public to support the use of the override provision of the *Charter*.”<sup>76</sup>

In *Vriend v. Alberta*<sup>77</sup>, the Supreme Court of Canada ordered the Alberta provincial government to add sexual orientation to the list of characteristics protected under the province’s human rights law. The apparently widespread negative public reaction to the ruling did not

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70. *House of Commons Debates* (6 April 1989) at 152-53. Professor Ted Morton, in a recent editorial piece, also argues that Prime Minister Chrétien should be less apologetic about section 33 and defend its virtues. F.L. Morton, “Chrétien and the Charter” *National Post* (6 November 2000). He also praised then Canadian Alliance leader Stockwell Day and supported his call for a principled use of section 33 to set aside bad judicial decisions.

71. H. Leeson, “Section 33, The Notwithstanding Clause: A Paper Tiger?” (2000) 6:4 *Choices* 3 at 3.

72. P. Russell, “Standing up for Notwithstanding” (1991) 29 *Alta L. Rev.* 293 at 295.

73. *Ibid.* at 308.

74. *Ibid.* at 301.

75. Leeson, *supra* note 71 at 20.

76. Vaughan, *supra* note 49 at 15.

77. [1998] 1 S.C.R. 493 [hereinafter *Vriend*].

extend to support of the notwithstanding clause. Research conducted by the Institute for Research on Public Policy found that of those who had heard about the case, a substantial majority in every region, including the Prairies, favored the Court's ruling.<sup>78</sup> Broken down by political party affiliation, Reform supporters showed the lowest level of support, which was still 49.1% in favor of the decision of the Court. Fletcher and Howe compliment Premier Klein's political wisdom in acceding to the Courts ruling in the *Vriend* case, despite the vocal protests of some.<sup>79</sup> For critics, the political consequences of the Supreme Court decision in *Vriend* represented a judicial trumping of legitimate provincial policy choices. However, the data from the research suggest that the majority of Canadians, even the majority of Albertans, concurred with the court, believing that homosexuals should receive the full protection of basic human rights legislation.<sup>80</sup> Quite apart from majority sentiments, the enhanced version of democracy discussed earlier would support a proper consideration of minority interests, even if the minority group was not popular.

The argument with respect to section 33 centres around rights and the best way to protect them. Public and political opinion is unsettled about whether the use of the override is appropriate either at all, or in what circumstances. Hiebert says that if legislative decisions are based on careful and sensitive consideration of how best to balance conflicting rights and values, and these decisions are nevertheless invalidated by the judiciary, the override might have greater acceptance.<sup>81</sup> The hope in the override clause is that it will be used "to preserve social arrangements that have been carefully worked out by legislators through a process in which competing interests have been fully explored and understood and compromises have been thoughtfully constructed."<sup>82</sup>

Parliament can rely on the override to resolve serious political/judicial differences. However, Parliament's power to override judicial decisions is not simply the retention of parliamentary supremacy, unadulterated, as existed prior to the *Charter*. Section 33 allows for "legislative review of judicial review,"<sup>83</sup> promoting responsibility by forcing Parliament and the judiciary to maintain a consciousness of one another.<sup>84</sup> This section

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78. J. Fletcher & P. Howe, "Supreme Court Cases and Court Support: The State of the Canadian Public Opinion" (2000) 6:3 Choices 30 at 39 [hereinafter "Supreme Court"].

79. *Ibid.*

80. *Ibid.* at 40, 42.

81. J. Hiebert, "Wrestling with Rights: Judges, Parliament and the Making of Policy" (July 1999) 5:3 Choices 3 at 32.

82. J. Whyte, "On Not Standing for Notwithstanding" (1990) 28 Alta L. Rev. 347 at 354.

83. P. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts" (1982) 25 Can. Pub. Admin. 1 at 32, quoted in Morton, *supra* note 24 at 54.

84. Morton, *ibid.*

of the Constitution, “does not diminish Parliament’s obligation to give effect to the Charter’s values in the course of developing and passing legislation.”<sup>85</sup> Therefore, “[a]lthough Parliament has the power to ensure the primacy of its decision, this power should be exercised only after careful consideration of why its views on an issue deserve to be paramount.”<sup>86</sup> In most cases, the use of section 33 would be considered to be “radical overkill, the equivalent of dropping the nuclear bomb in a war.”<sup>87</sup> There are other less costly and much less controversial methods available to legislatures to achieve their objectives.

Professor Russell argues that the advantage of retaining a role for legislators in the determination of rights is not to ensure that the will of the majority prevails, but to facilitate the democratic idea of government by discussion.<sup>88</sup> Parliamentary institutions enable government to have a mutual exchange of ideas, mutual criticism of ideas and to elicit and enlist (as much as possible) the general capacity of every member.<sup>89</sup> Combined, sections 1 and 33 are powerful tools which result in a balancing of the judicial and legislative roles. If anything, the section 33 override would imply that the courts do not have the power to be as interventionist as is argued by Morton and Knopff.

### *Influence of the Charter on the Legislators*

Because their decisions are subject to judicial review for *Charter* consistency, governments are somewhat constrained in their ability to pursue legislative priorities.<sup>90</sup> Sensitivity to the *Charter* does not mean that policies are forsaken because they incur *Charter* risks; however, less risky ways to accomplish policy objectives may be considered. Two divergent views have emerged about the *Charter*’s influence on the political will to pursue policies that attract rights-based criticism.

The view put forward by Professor Michael Mandel is that the *Charter* offers a convenient refuge for politicians to avoid or delay difficult moral decisions.<sup>91</sup> Insulating themselves from political criticism, elected representatives can look to the court to resolve rights issues; thus, as Hiebert argues, “the Charter may diminish political resolve to define pressing social problems and exercise judgment about how best to reconcile these with constitutional standards.”<sup>92</sup> Avoiding difficult and controversial

85. Hiebert, *supra* note 81 at 32.

86. *Ibid.* at 32.

87. Leeson, *supra* note 71 at 19.

88. Russell, *supra* note 72 at 299.

89. E. Barker, *Reflections on Government* (London: Oxford University Press, 1948) at 36. See also *supra* note 72 at 300.

90. Hiebert, *supra* note 81 at 3.

91. *Supra* note 2.

92. Hiebert, *supra* note 81 at 4.

decisions by waiting for a decision from the courts may be a tempting method of avoiding controversial issues. Hiebert argues that answers to rights conflicts should not be assumed to be uniquely and intrinsically legal. Rather “social conflicts are political in the sense that they invoke differing philosophical assumptions about which values are important, what priorities should be attached to conflicting rights, and what the role of the state should be in defining and responding to social and cultural concerns.”<sup>93</sup> The abdication of political responsibility to the courts serves to weaken the fabric of democratic decision-making:

[T]he danger here is not so much that non-elected judges will impose their will on a democratic majority, but that questions of social and political justice will be transformed into technical legal questions and the great bulk of the citizenry who are not judges and lawyers will abdicate their responsibility for working out reasonable and mutually acceptable resolutions of the issues which divide them.<sup>94</sup>

The other view, put forward by Dean Peter Hogg, is that in a process of “dialogue” between the legislatures and the courts, the *Charter* need not frustrate legislative objectives. The Supreme Court rarely rules that a legislative objective itself is inconsistent with the *Charter*; rather it scrutinizes the reasonableness of the means by which legislative objectives are implemented. Legislatures are then given the opportunity to revise legislation with more attention to how they can achieve their legislative objectives with less intrusion upon *Charter* rights. Dean Hogg suggests that the *Charter* facilitates a healthy dialogue about how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.<sup>95</sup>

In 1982, a Human Rights Law Section was established in the Department of Justice to review existing legislation for *Charter* conflicts and provide ongoing advice about *Charter* issues. Justice lawyers in the Human Rights section have encouraged other departments to seek *Charter* advice early in the process of developing policy, so that legislative objectives can be accomplished in a manner that is likely to survive a *Charter* challenge and minimize disruption in obtaining the policy goal. Another advantage of thinking about *Charter* implications early is that

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93. *Ibid.* at 4.

94. P. Russell, “The Political Purposes of the Canadian Charter of Rights and Freedoms” (1983) 61 Can. Bar. Rev. 30 at 52.

95. P.W. Hogg and A.A. Bushell, “The Charter Dialogue Between the Courts and the Legislatures (Or Perhaps the Charter of Rights Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall L. J. 75 at 104-105.



legislators are able to anticipate possible *Charter* challenges and consciously develop a legislative record for addressing judicial concerns.<sup>96</sup>

Hiebert shows that political response to the *Charter* has been active. When the Supreme Court struck down tobacco legislation in *RJR-MacDonald*<sup>97</sup>, the government revised its initiative and passed new legislation. Legislative initiatives addressing rules for sexual assault trials and access to private records provide even stronger examples of how Parliament is not reneging on the responsibility to pursue important social policy rights. Twice legislation has been passed showing how Parliament interprets rights differently from the majority of the Supreme Court. The differences appear in the legislative responses to a trilogy of Supreme Court decisions: *R. v. Seaboyer*,<sup>98</sup> *R. v. O'Connor*,<sup>99</sup> and *R. v. Carosella*.<sup>100</sup>

After the Rape Shield provisions in the *Criminal Code*<sup>101</sup> were ruled unconstitutional, Parliament responded with Bill C-49. This bill demonstrated that Parliament was not prepared to accept the ruling of the Supreme Court as the final word. This new bill was developed after extensive consultation with women's groups and received all party support: "Parliament addressed and responded to *Charter* concerns in a manner that was neither dismissive of rights-based criticisms nor intimidated by suggestions that the judiciary was the more appropriate venue for resolving ... [this conflict]."<sup>102</sup>

In *O'Connor*, the majority of the Court ruled that women's confidential treatment records are relevant and necessary for a full answer and defense in a fair trial. Following the decision, the government introduced Bill C-46 in reaction to what it considered too low a threshold for gaining access to private medical records. The government felt that access to these records is neither as relevant, nor should access be granted as frequently, as the majority of the Court suggested. By imposing additional criteria, the legislation requires a judge to assess the situation carefully before ordering that records be produced. The legislation received support from all parties and was accompanied by a preamble stating Parliament's intent.

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96. Hiebert, *supra* note 81 at 7.

97. *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 [hereinafter *RJR-MacDonald*].

98. *R. v. Seaboyer*, [1991] 2 S.C.R. 577 [hereinafter *Seaboyer*].

99. *R. v. O'Connor*, [1995] 4 S.C.R. 411 [hereinafter *O'Connor*].

100. *R. v. Carosella*, [1997] 1 S.C.R. 80 [hereinafter *Carosella*].

101. R.S.C. 1985, c. C-46, s. 276.

102. Hiebert, *supra* note 81 at 17.

Hiebert suggests that these legislative initiatives, which differ significantly from judicial views on the same topic, do not constitute a dismissal of the priorities of constitutional values and obligations. Nor are they explained by ignorance of the *Charter* or triumph of partisan, electoral or self-serving interests over rights based principles. Rather, these legislative initiatives are based on "a deliberate and conscious intent to change the prevailing normative and legal assumptions for sexual assault trials and to alert the judiciary to an alternative interpretation of the Charter which situates trial fairness in a broader context of respect for other Charter rights."<sup>103</sup>

This same process of openly balancing the competing interests is continued in the recent Supreme Court of Canada decision, *R. v. Darrach*.<sup>104</sup> In this case, the Court was asked to further reconsider the application of the Rape Shield laws and their impact upon the fair trial of an accused person. After an open balancing of the principles of fairness, equality, and privacy, the Court upheld the existing legislation and its application in this particular case. One of the lessons of this case is that the dialogue between the courts and the legislatures can be an on-going one, but that the courts may give the same answer more than once. At some point there is presumably little left to discuss. It also suggests that the legislators can influence the thinking of the judges as well as the reverse. It is assumed that the legislation will not continue to go back and forth like a yo yo, but that the legislators will acquiesce to the court's view or the courts will change their stance.

The ideal of institutional dialogue between the courts and the legislatures requires listening and responding to the other party's concerns. One way to facilitate this conversation, Hiebert suggests, is to establish a parliamentary committee with specific responsibilities to evaluate bills from a *Charter* perspective.<sup>105</sup> She suggests that the purpose of such a committee would be different from bureaucratic scrutiny. Its purpose would be to ensure that legislative decisions, which have implications for fundamental rights, are made only after more deliberation. The role of the committee, "would be to provide a foundation for Parliament's collective and principled judgment about whether policies are important and compelling in light of the Charter and consistent with the values of a free and democratic society."<sup>106</sup> Hiebert suggests that rights claims should be seen as part of a complex political process in which political actors must

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103. *Ibid.* at 26.

104. [2000] 2 S.C.R. 443.

105. *Supra* note 81 at 27.

106. *Ibid.* at 28.

evaluate the strength of the claim alongside the importance of a legislative objective.<sup>107</sup>

Hiebert's concept differs significantly from the parliamentary *Charter* committee suggested by the Reform party. Former opposition Leader Preston Manning's suggestion was that a judicial review committee would systematically review Supreme Court of Canada decisions that find federal laws in contravention of the *Charter*. This committee would then consider whether to change the legislation or to use the notwithstanding clause. While Peter Russell asked, "[w]hy should Parliament wait until the horse is out of the barn to consider Charter implications of legislation,"<sup>108</sup> Manning felt that prior review of legislation was unlikely, "to rein in the judges."<sup>109</sup> Hiebert argues that Manning's criticism misses the point, since "independent of whether courts will be influenced by the committee scrutiny of legislation, Parliament owes it to itself and to Canadians to take a more active and independent role to interpret and apply the *Charter* in respect to social policy and to exercise its collective judgment about whether legislation is constitutionally justified."<sup>110</sup> Hiebert recognizes the institutional disagreement will not end simply because Parliament has taken its responsibilities under the *Charter* more seriously. If the court still disagrees with the government, the government needs to pay careful consideration as to why the court was troubled with the legislation, rather than respond to a negative ruling with immediate consideration of the override.<sup>111</sup> All branches of the state are responsible for the implementation of the *Charter* values.

While judges have the prerogative to disagree with legislative decisions regardless of how carefully thought out they are, "a systematic and proactive approach to the *Charter* will signal to judges that the legislature has been mindful of the *Charter* and has exercised its informed judgment about how the *Charter* should be interpreted and applied to social policy."<sup>112</sup> When courts are aware of Parliament's sensitivity to the *Charter*, they may be more willing to accept parliamentary decisions with respect to social policy objectives.<sup>113</sup>

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107. *Ibid.* at 28.

108. P.H. Russell, "Reform's Judicial Agenda" (1999) 20:3 Policy Options 12 at 13.

109. E. Preston Manning, "A 'B' for Prof. Russell" (1999) 20:3 Policy Options 15 at 15.

110. *Supra* note 81 at 29.

111. *Ibid.* at 30.

112. *Ibid.* at 31.

113. *Ibid.* at 32.

### 3. *A Legitimate Expansion of the Judicial Process to Promote “Contextualized” Decision-Making*

A major component of the Morton and Knopff critique of judging after the *Charter* has to do less with the wording of the *Charter* itself, than with what the judges have done with it. They contend that judges have strayed into the policy-making arena in a way that calls the legitimacy of the judiciary into question. Morton and Knopff particularly object to the use of the courts by various interest groups to circumvent the political process and to use the courts to advance their causes in the judicial, rather than political, arena.

#### a. *Interest Group Intervention*

The term the authors coin to describe these beneficiaries of judicial activism under the *Charter* is the “Court Party”:

If judges are a more important cause of the Charter revolution than the Charter itself, an even more significant cause is the Court Party. The social movements composing the Court Party would have grown in prominence even without the Charter; they would not have gone so far so fast, however. The Charter gave them a new venue, the courtroom, to pursue their agendas and conferred on them the status needed to participate in the arena of constitutional politics. The result has been enhanced legitimacy (and generous state funding) for Court Party efforts in the legal arena.<sup>114</sup>

There would no doubt be some overlap between the Court Party and what Justice McClung in the Alberta Court of Appeal decision in *Vriend v. Alberta*<sup>115</sup>, colourfully referred to as, a “rights-euphoric cost-scoffing lefty”. In chapter three of their book, Morton and Knopff describe the various members of the Court Party as falling in the following categories: unifiers (referring to the nationalizing agenda of former Prime Minister Trudeau’s *Charter*); civil libertarians; equality seekers; social engineers (including feminists and the gay rights movement); and post materialists. In this latter category the authors refer to the producers of knowledge and information such as universities (and in particular law schools).

Morton and Knopff see this new “knowledge class” as playing a vital role in supporting the Court Party by providing administrative supports, rights-experts, and advocacy scholarship. The authors also see this new “knowledge class” as decidedly on the left of the political spectrum, and out of touch with the majority of society.

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114. *Supra* note 3 at 59.

115. (1996), 181 A.R. 16 (C.A.) [hereinafter *Vriend v. Alberta*], rev’d [1998] 1 S.C.R. 493.

While postmaterialist interest groups are not occupational groups, they do have a class character. In particular, the new postmaterialist concerns are most prevalent outside the working classes. The reform elements concerned with postmaterialist or social issues largely derive their strength not from the workers and the less privileged, the social base of the [economic] left in industrial society, but from segments of the well educated and affluent, students, academics, journalists, professionals and civil servants. The latter are all participants in the 'knowledge industry' that is a new focus of power in post-industrial democracies. Just as property was the foundation of elite power in industrial society, so knowledge (based on high levels of education) is the vehicle of power in post-industrial politics of the administrative state.

Of course, it is as difficult today as it has always been for a 'knowledge class' to exercise power through majoritarian institutions (consider Plato's philosopher kings). This helps to explain why postmaterialism is attracted to the anti-majoritarian power of the courts. Unlike the progressive reformers of past generations who sought to transfer power from the few rich to the many poor, the postmaterialist left finds itself in the minority and sees the majority as a problem. Inglehart has demonstrated that postmaterialist values are much more prominent among intellectual, bureaucratic, media, and political elites than among the general population. This fact, he argued, created a 'tactical dilemma' for 'the Left in contemporary society.'<sup>116</sup>

The argument is that the Court Party speaks through intervenors such as the Legal Education and Action Fund ((LEAF) and the Canadian Civil Liberties Association (CCLA) to influence the courts and even capture their agenda. There is no question that the number of interventions in court cases has increased since the *Charter*, and that the diversity and range of these groups have grown. However, I would suggest that the protection of minorities is important in upholding democratic values, not the anti-democratic conspiracy decried by Morton and Knopff. Democracy is about representing everyone in society, not only the majority.

Interest group litigation is important because it, "affects the style and substance of our political life."<sup>117</sup> Hein argues that the account advanced by conservative critics is incomplete and misleading. While Morton and Knopff may be correct that social activists are eager to pursue legal strategies, "their interpretation ignores the fact that economic interests also appreciate the benefits of litigation."<sup>118</sup>

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116. *Supra* note 3 at 78-79.

117. G. Hein, "Interest Group Litigation and Canadian Democracy" (2000) 6:2 Choices 3 at 3.

118. *Ibid.* at 4.

A diverse range of interests pursue litigation because governments and courts have created new opportunities to participate. Since 1982, governments have introduced funding programs and statutory rights to make administrative regimes, the regulatory process, and the judicial system more accessible.<sup>119</sup> The Supreme Court has also introduced changes that have encouraged interest group litigation. The old common law rule of standing has been liberalized in stages. The old law favoured property owners and corporations trying to protect private rights and filtered out citizens who wanted to address public problems.<sup>120</sup> Under the new rule, applicants who ask a serious legal question and demonstrate a genuine interest can win access if certain conditions are satisfied. Rules for intervening have also been relaxed where groups with a record of advocacy displaying expertise in a particular area usually receive permission to appear.<sup>121</sup>

Hein's study found, "the propensity to litigate is elevated by three stable characteristics: impressive legal resources, identities bolstered by rights, and normative visions that demand judicial activism."<sup>122</sup> Organizations not inclined to litigate can take advantage of interpretive opportunities, counter immediate threats, and move policy battles into the courtroom when their political resources wane. Hein found that interests that have the greatest potential to influence public policy through litigation are those affected by both stable characteristics and changing circumstances.

While constrained courts would cause fewer disruptions, Canadian society would pay a price. The relative calm found by "traditional judicial review" favours corporations but filters out interests and values of public interest.<sup>123</sup> Majority interest groups, of course, have greater access to, and impact on, the legislative branch based on their numbers and political clout. The obstacles created by returning to former court rules of standing would hinder interests concerned with racism, homophobia, gender inequality, environmental degradation, poverty, the lives of the disabled, and the plight of Aboriginal peoples. The surprising conclusion of Hein's study is that corporate interest groups and those favouring a conservative view, such as the National Citizens' Coalition, fare well in the courts,

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119. *Ibid.* at 10.

120. *Thorson v. Attorney General of Canada*, [1975] 1 S.C.R. 138; *Nova Scotia Board of Censors v. McNeil*, [1976] 2 S.C.R. 265; *Minister of Justice v. Borowski*, [1981] 2 S.C.R. 575; *Minister of Finance of Canada v. Finlay*, [1986] 2 S.C.R. 607; and *Canadian Council of Churches v. Canada*, [1992] 1 S.C.R. 236.

121. I. Brodie, "Intervenor and the Charter" in F.L. Morton, *Law, Politics and the Judicial Process in Canada* 2d ed. (Calgary: University of Calgary Press, 1992) at 224.

122. *Supra* note 117 at 16.

123. *Ibid.* at 26.

even under the relaxed standing rules. Thus according to Hein's study, corporate interests continue to have good access to both political and judicial decision-makers.

The opening up of the judicial process to a wider range of interests and perspectives is part of a general evolution of all courts (especially the Supreme Court of Canada) to make their decisions in a more contextualized form. This is a positive development that allows the courts to avoid the arid legalism for which they have been criticized in the past by people such as Paul Weiler.<sup>124</sup> Contextualizing judicial decisions has become the hallmark of the modern judiciary and an important principle to be followed in all areas, not just constitutional law.<sup>125</sup> In my recent study based upon computer research, I discovered that the Supreme Court of Canada used the term "context" in its decisions 400% more since the arrival of the *Charter* in 1982.<sup>126</sup> The use of the term also increases with each successive Chief Justice – beginning with Laskin and continuing through to the current Chief Justice, McLachlin.

This opening up of the judicial process is based on a recognition by the courts of the complexity of legal problems in modern society. There is less consensus in Canada than there used to be as to what is the "right answer" to complex problems, such as abortion, the definition of the family, or the proper meaning of equality. Based upon interviews with judges, the authors of *Final Appeal*<sup>127</sup> confirm this assertion that at the Supreme Court of Canada level, judges recognize the complexity of searching for correct legal answers. Therefore, these judges appreciate the various perspectives on a problem that can be provided by intervenors as well as the parties to the dispute:

Our interviews with Supreme Court of Canada judges indicated that all those interviewed were aware of this desire in the lower courts for 'one right answer,' but the majority thought that it would be intellectually dishonest to move in that direction, because in most cases there were, in fact, several competing 'correct' answers, and the development of the law is stimulated by exposing readers to alternate modes of reasoning.<sup>128</sup>

The dangers of not considering a range of different perspectives is reflected in the criticism by Justice L'Heureux-Dubé of the lower court decision of Justice McClung in *R. v. Ewanchuk*.<sup>129</sup> While Morton and Knopff argue that the success rate of women's groups, such as LEAF, in

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124. *Supra* note 25.

125. S. Sugunasiri, "Contextualism: The Supreme Court's New Standard of Judicial Analysis and Accountability" (1999) 22 Dal. L.J. 126.

126. *Supra* note 44 at 265.

127. *Supra* note 5.

128. *Ibid.* at 16.

129. [1999] 1 S.C.R. 330.

leading equality cases is proof of the extent to which courts have become captive to special interest groups, they fail to consider the courts' own articulation of a broader and more sophisticated version of equality. Judges are not so weak as to be influenced by lobby groups to reach an inappropriate result. This would run counter to their deep traditions of judicial independence. However, they are becoming increasingly open to the idea that the *Charter* should be given a broad and purposive interpretation. A range of different perspectives and evidence enriches this interpretation process. The broad and purposive approach that courts have taken to the process of *Charter* interpretation reflects their views on the centrality of *Charter* values in our new constitutional structure, and the role of the courts in protecting these rights and values. It is not a matter of the courts being lead astray, but rather the judges themselves reaching conclusions that Morton and Knopff do not like. Their real objection to the new role of the courts is substantive and not just procedural.

b. *The Emerging Jurocracy*

It is not only the influence of interest groups and the Court Party that concerns Morton and Knopff, but also the process of decision-making within the judicial bureaucracy itself. According to their analysis, the judges have fallen victim not only to forces outside the court structure, but also to those within. The enemies within are identified as the law clerks who, while toiling in relative obscurity, are alleged to have a major impact on the decisions of the appeal courts, especially the Supreme Court of Canada:

When we think of courts and judicial decision-making, we think mainly of judges. In fact there is a new set of judicial decision-makers invisible to the public but increasingly influential. These are the clerks, the scores of recent law school graduates who assist appeal court judges in researching and writing opinions.

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This rapid growth in the number and functions of the clerks has effected a devolution of power from the top (judges) to the middle (clerks) of the bureaucratic pyramid.<sup>130</sup>

The alleged influence of these law clerks is made more sinister by their links to their former law schools (charter members of the knowledge class). These law clerks are described as the conveyor belt by which the ideas of the Court Party are injected into the judicial bureaucracy:

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130. *Supra* note 3 at 110.



The clerks' drafting and filtering functions are coloured by close ties to their law schools. Selected annually from the top graduates of Canadian law schools, they serve as an intellectual conveyor belt from the law schools to the inner sanctum of the Supreme Court. The clerks on the US Supreme Court have been described as a 'law school conduit' as they 'carry the attitudes of the revisionist academic culture directly to the federal judges'.... Professors are likely to have been clerks to federal judges, and they send their best students to clerkships.<sup>131</sup>

Morton and Knopff also express concern about the *Charter* orientation of these predominantly young law clerks and how that may influence the decisions of the Supreme Court of Canada. They state:

Unlike the judges for whom they work, the clerks have 'studied the Charter in high school, university, and law school.' This 'formative period of their legal education has been one in which the rights of women, linguistic and ethnic minorities, refugees, prisoners and other groups are perceived to have been enhanced as a direct result of Supreme Court action. With some exceptions, clerks tended to applaud these developments and sought to extend them further.' In sum, the influence of clerks has been an important factor in the Court Party's success before the Supreme Court. As in all dealings with government bureaucracies, having supporters on the inside is the ultimate form of positional support.<sup>132</sup>

As a former law clerk to the late Chief Justice Laskin, I feel that Morton and Knopff have overstated the role of the law clerk and underestimated the fierce independence of judges in making their own decisions in all cases that come before them. While law clerks play an important role, they are not judges in disguise. The role of the law clerk is to assist the judge by researching the law and bringing a different perspective to the legal issues at hand but not to make the decisions or write the judgements. Certainly I did not write decisions for Chief Justice Laskin and I expect that the same is likely true for other law clerks. In relation to the power and influence of law professors, once again I think that Morton and Knopff are misguided. Academics do have a role to play in assisting judges to put their decisions in a broader context, but the final decision is always that of the judge. It is true that the reference to the writing of legal academics has increased in recent years, but the Court usually considers scholarship on both sides of a legal dispute, and the judges have not abdicated their ultimate decision-making role to the "knowledge class". Law schools (even Dalhousie) are not as powerful institutions as the authors of the book suggest.

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131. *Ibid.* at 112. I am identified by Morton and Knopff as one of those former law clerks (to the late Chief Justice Laskin in 1978-79) who has gone on to teach at law school and send my students to the Supreme Court as law clerks.

132. *Ibid.* at 113.

Beyond the allegation that the judges are influenced by both internal and external forces, Morton and Knopff also suggest that the judges have over-stepped their traditional boundaries. The more serious attack on the legitimacy of the role of the courts under the *Charter* is one that is based on the invasion of traditional policy-making terrain by the courts. As Professor Kent Roach indicates this should be less of an issue in Canada than it is in the United States.<sup>133</sup> Canada does not have a clear separation of powers, and sections 1 and 33 of the *Charter* invite the kind of court/legislature dialogue discussed earlier in this paper. Morton and Knopff also object to an expanded judicial role because of the lack of judicial accountability. It is also easy to overstate the extent to which judges are above accountability. Not only must they articulate reasons for their decisions, they are also taken to account by the media, academics, and last, but not least, by the relevant judicial councils. The accountability and democratic nature of the legislative and executive branches of government should also not be assumed. This problem has been discussed earlier in respect of the concentration of power in the executive branch of government.

Critics of the post-*Charter* courts claim that judicial rulings on contentious matters, from gay rights to police procedures, are effectively making law that would be better left to democratically elected representatives. This is a central feature of the Morton and Knopff critique of the *jurocracy*. But as discussed earlier, the courts do have an important role to play in the more nuanced version of democracy that goes beyond the majoritarian version of the democratic state. Supporters of the post-*Charter* courts see judicial review as a safeguard of fundamental individual and minority rights.<sup>134</sup>

No matter how controversial some *Charter* decisions have been, there can be no question that Canadians have embraced the *Charter*; it has provided an "indigenous point of national coalescence."<sup>135</sup> Despite the criticisms of Morton and Knopff and other conservatives, judges are held in higher esteem than legislatures. A recent poll indicates that the public not only rejects the idea that judges have too much power, but instead believes that judges should have more power.<sup>136</sup> Research conducted by professors at York University found that 70% of Canadians had, "some degree of confidence" in the courts, while only 46% had "some degree of

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133. *Supra* note 30 at 532.

134. J.F. Fletcher & P. Howe, "Canadian Attitudes Toward the Charter and the Courts in Comparative Perspective" (2000) 6:3 *Choices* 4 at 4 [hereinafter "Canadian Attitudes"].

135. Vaughan, *supra* note 49 at 13.

136. L. Chwialkowska, "Poll Shows Canadian Divided on Judges' Power to 'Make Law'" *National Post* (18 February 2000) A4.

confidence" in legislators; fifty-two percent of Canadians thought the ethical principles of judges were higher than average, while only 17% thought members of legislature had that same level of ethical principles.<sup>137</sup>

Joseph Fletcher and Paul Howe asked what Canadians thought about the *Charter* and the new responsibilities of the courts since the *Charter*. Specifically, are they satisfied with the judicial politics? Would they like courts to show greater deference toward government? Or are Canadians happy with the *Charter* and the work of the courts?<sup>138</sup> They assert that "[i]f citizens were largely satisfied, it would seem difficult to sustain the critics' objections, which are, after all, grounded in the supposition that the views of the majority should be afforded greater weight."<sup>139</sup> Fletcher and Howe use data from a national survey of 1,005 Canadians commissioned by The Institute for Research on Public Policy in 1999 and previous studies from 1987. It is always wise to be cautious with statistics and their use, but even allowing for polling error and misinterpretation the conclusions of these studies are interesting.

When Canadians were asked who should have the final say on controversial issues, they favored the courts by a 2 to 1 ratio in both 1987 and 1999.<sup>140</sup> Canadians across virtually all social and democratic strata and in every region of the country showed this pattern. A statistically significant difference between Canadians was found when political partisanship was considered. Members of the Reform party showed an even split on their answer to this question, with 44.4% favoring the court and the same percentage favoring the legislature.<sup>141</sup> Even when asked, "what if the Supreme Court of Canada started making decisions that most people disagreed with?" the majority of Canadians polled still expressed support for courts having the final say.<sup>142</sup>

Fletcher and Howe elsewhere found that Supreme Court of Canada decisions enjoying widespread public approval seem to generate support for the Court, "but on issues where most Canadians disagree with the Court, their attitudes do not translate into negative feelings toward either the *Charter* or the Court."<sup>143</sup> If courts, thanks largely to the *Charter*, often undercut legitimate public preferences, as expressed in ongoing legislative and executive practices, why then do Canadians hold the *Charter* and

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137. "Canadian Attitudes", *supra* note 134 at 1.

138. *Ibid.* at 5

139. *Ibid.* at 5

140. *Ibid.* at 12.

141. *Ibid.* at 14.

142. *Ibid.* at 17, 19.

143. "Supreme Court", *supra* note 78 at 31.

the Courts in such high regard? Contrary to the hopes and expectations of critics such as Morton and Knopff, recent decisions on controversial issues have not undermined the strong public support for Canada's judicial system. "Despite a barrage of criticism recently directed at certain prominent judicial rulings, support for the courts and the *Charter* is holding firm."<sup>144</sup>

### III. *Objections to a Changing Value Structure: Concluding Thoughts*

Although it is not expressly stated, the underlying objection of Professors Morton and Knopff is not just to the distortion of institutional structures but also to a change in the basic Canadian value structure. This level of criticism is implicit in the authors' examination of the expansion of the concept of equality at the hands of both human rights tribunals and the courts. Referring to the collaboration of human rights tribunals and courts as "incestuous" Morton and Knopff make the following observation:

The cross-fertilization of equity concepts and their extension into the private sphere illustrates the willingness of Court Party equality seekers to sacrifice liberty in the name of equality. As we observed in chapter 3, the traditional purpose of constitutional bills of rights is to protect individual liberty by restricting what the state can do and how. The explicit purpose of the HRAs is not to protect society from the state but to reform society through the state. That is, the *Charter* controls state actions, while an HRA regulates private actions. Interpreting the *Charter* to require the expansion of HRAs, as the Federal HRC urged in *Vriend*, makes the *Charter* a state expanding rather than a state limiting document.<sup>145</sup>

There is little doubt that Professors Morton and Knopff feel that the Supreme Court of Canada went too far in many of the leading equality cases such as *Vriend*<sup>146</sup> and *Eldridge v. British Columbia*.<sup>147</sup> Their objection is not directed solely at process (objecting to an expanded judicial role) but also at substance (objecting to the expansion of the concept of equality). One can have some sympathy for the authors' "social engineering" critique when cases such as *Law v. Canada*<sup>148</sup> and *Corbierre v. Canada*<sup>149</sup> are considered. These cases, which claim to present a coherent framework for dealing with equality by expanding on the earlier cases, may have sacrificed predictability in the name of flexibility and context sensitivity. The discretionary role for judges in equality cases has been expanded. To define equality in terms of viola-

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144. *Ibid.* at 54.

145. *Supra* note 3 at 116.

146. *Supra* note 77.

147. [1997] 3 S.C.R. 624 [hereinafter *Eldridge*].

148. [1999] 1 S.C.R. 493 [hereinafter *Law*].

149. [1999] 2 S.C.R. 203 [hereinafter *Corbierre*].

tions of dignity, is to define one concept by reference to an equally vague and open-ended concept. The ambiguity of the definition of *Charter* equality in *Law* is emphasized by the fact that both the majority and the dissent in *M. v. H.*<sup>150</sup> cited the principles in the *Law* case as the bases for their decisions.

Justice Rosalie Abella, of the Ontario Court of Appeal, makes an analysis of the Morton and Knopff critique, similar to mine, in the following passage:

With the arrival of the 1990s, a few abrupt voices were heard to challenge the Supreme Court, voices in large part belonging to those whose psychological security or territorial hegemony were at risk from the *Charter*'s reach. As the decade advanced, so did the courage and insistence of these New Inhibitors, most of whom appeared to congregate at one end of the ideological spectrum. While their articulated target was the Supreme Court of Canada, their real target was the way the *Charter* was transforming their traditional expectations and entitlements.

They made their arguments skillfully. In essence, they turned the good news of constitutionalized rights, the mark of a secure and mature democracy, into the bad news of judicial autocracy, the mark of a debilitated and devalued legislature. They called minorities seeking the right to be free from discrimination 'special interest groups seeking to jump the queue.' They called efforts to reverse discrimination 'reverse discrimination.'<sup>151</sup>

Whether or not it is fair to refer to Morton and Knopff as the "New Inhibitors", there is little doubt that a major part of their objection to the role of the courts in the post *Charter* era is that they do not like the values the judges are promoting. Morton and Knopff see the courts as a vehicle for the ascendancy of the values of special interest groups, which promote values with which they do not agree and which they feel do not accord with the views of the majority of Canadians. However, the poll results discussed above suggesting a high approval rating for both the courts and the *Charter* raise doubts about whether Morton and Knopff really represent the majority view. In any event, the courts are articulating a view of individual rights that has been enshrined in the *Charter* by a democratic constitutional amendment process.

One way in which Morton and Knopff reveal their values bias is in their reference to "interest" groups rather than groups promoting "rights". Their conflation of rights and interests is a subtle way of diminishing claims to rights, such as equality or environmental protection. There is

150. [1999] 2 S.C.R. 3.

151. Adapted from Keynote Address delivered at Osgoode Hall Law School, York University, Toronto, *Globe and Mail* (13 April 2000) A 17.

something unseemly about interest groups lobbying and possibly influencing the courts. The matter takes on a different image if it is described as groups seeking their constitutional rights by using the courts as the forum. This is not to suggest that some groups do not dress up interests in the form of rights to advance their cause. However, it is not a universal phenomenon, and it is unfair to put all interest groups, including genuine rights-seekers, in one category.

Finally, the authors assume that the role of the liberal state and the courts in particular are to be neutral and in some ways value free. Not only is this not possible, it is also not desirable. The limits on such neutrality are illustrated by Professor Michael Sandel when referring to the American debate about slavery:

Whatever his personal moral views, Douglas claimed that, for political purposes at least, he was agnostic on the question of slavery; he did not care whether slavery was 'voted up or voted down.' Lincoln replied that it was reasonable to bracket the question of the morality of slavery only on the assumption that it was not the moral evil he regarded it to be. Any man can advocate political neutrality 'who does not see anything wrong in slavery, but no man can logically say it who does see a wrong in it; because no man can logically say he don't care whether a wrong is voted up or voted down.'<sup>152</sup>

...

The debates over abortion and slavery show that a political conception of justice must sometimes presuppose an answer to the moral and religious questions it purports to bracket. At least where grave moral questions are at stake, it is not possible to detach politics and law from substantive moral judgment. But even in cases where it is possible to conduct political debate without reference to our moral and religious convictions, it may not always be desirable. The effort to banish moral and religious argument from the public realm for the sake of political agreement may end by impoverishing political discourse and eroding the moral and civic resources necessary to self-government.<sup>153</sup>

I agree with Professor Sandel that the state, in all its forms, cannot be neutral on controversial and important matters such as abortion, gay rights, and equality. The role of the courts in a constitutional democracy, such as Canada, is to give effect to the rights and values expressed in the Constitution. As the Supreme Court of Canada indicated in *Vriend*<sup>154</sup> the Canadian Constitution was adopted in a democratic process by the elected representatives of the people. Although the courts inherited the text of the *Charter* and have given the words meaning, they did not single-

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152. M. Sandel, *Democracy's Discontent* (Cambridge: Belknap Press, 1996) at 22.

153. *Ibid.* at 23.

154. *Supra* note 77.

handedly create its meaning. As Chief Justice McLachlin suggests, all three branches of government have a role to play in living up to the values of the *Charter*:

In fact, the relationship between the elected legislators and the courts in a constitutional democracy such as ours is symbiotic. A just society is not the product of the elected legislators alone, nor is it the product of effective administration and enforcement of the laws. A just society is the product of responsible action by all three segments of government – the elected legislators, the executive charged with enforcing and administering the law, and the courts. The courts do not cooperate with the elected legislators and the executive in an active sense. This is because the courts must be ‘independent’ of the other two branches of government in order to discharge their impartial decision-making function. However, it does not mean that the courts and the legislators do not work together to produce justice.<sup>155</sup>

The courts have generally performed well in giving meaning to the text of the *Charter* in a way that fairly balances competing interests. Judges do not run the country, nor do they likely want to. Those who criticize the courts are not just concerned with the process and democracy but also with the values promoted by the courts. These are values embodied in the *Charter* and not just a judicial flight of fancy. When a court is interventionist, it is upholding values sacred to this country or limiting individual rights in the broader interest of the larger society. The courts are not trying to run the country, but they are attempting to play their legitimate and important constitutional role. Canada’s judges are fellow travellers in the democratic enterprise with the legislative and executive branches of government and do not pose the threat to our traditional modes of policy making that Professors Morton and Knopff suggest they do. While there is always room for improvement, our courts are generally serving us well.

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155. McLachlin, *supra* note 69 at 35.